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January 14, 1992

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

Mr. Allen P. Hubbard, P.E.
Waste Cleanup Section Manager
Florida Department of Environmental
Regulation
Central District
3319 Maguire Boulevard, Suite 232
Orlando, Florida 32803-3767

FDER's Assertion of Permitting/Enforcement Jurisdiction for Current Groundwater Treatment and Discharge Activities at Chevron Chemical Company CERCLA Site Orlando, Florida

Dear Mr. Hubbard:

This firm has been engaged to represent Chevron Chemical Company "Chevron") to assist in resolving the conflict of jurisdiction which has apparently arisen regarding the above-captioned site ("the Site"). Thank you for your letter of December 20, 1991 enclosing a copy of your letter to the Region IV, United States Environmental Protection Agency ("EPA" or "EPA Region IV").

As indicated in Chevron's letter of December 16, 1991 to Mr. A. Alexander of the Florida Department of Environmental Regulation ("FDER"), Chevron desires to cooperate fully with all of the regulatory agencies which have jurisdiction over the Site, both in implementing the present CERCLA removal action and in making arrangements for the ultimate long-term

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remediation of the Site. We believe that you are mistaken, however, in your assertion that FDER has permitting or enforcement authority concerning the current groundwater and air elements of the removal activities now underway at this Site.

In order to analyze the appropriateness of FDER's assertion of permitting or enforcement authority, several documents are relevant.[1] FDER has previously taken the position that Chevron must obtain a Florida Industrial Wastewater Treatment/Disposal Permit (and possibly an Air Permit) or a FDER "Consent Order in lieu of these permits" to complete the removal action defined in the EPA-approved RAP for this Site.[2] FDER's rationale was that since "the EPA require[s] removal [of soils] only to the water table for the purposes of the AOC," and any "removal below the water table is based on [Chevron's] internal project goals," Chevron "can excavate only to the water table until the technical dewatering issues have been resolved" through FDER's permitting process.[3] As the EPA advised you on December 3, 1991, however, the soil excavation contemplated in the EPA-approved RAP extends below the

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[1]These include: the Administrative Order on Consent (the "AOC"), selected correspondence from the EPA On Scene Coordinator ("EPA-OSC") to Chevron, the Removal Action Plan (the "RAP"), correspondence from representatives of FDER to Chevron and EPA-OSC, dated October 30, 1991, November 1, 1991 and December 20, 1991 respectively, and the December 3, 1991 letter from EPA-OSC to FDER.

[2]October 30, 1991 letter from Mr. Alexander to Ms. Nancy Zevesky (sic) at 2; see also December 20, 1991 letters to both Chevron and EPA (notwithstanding the AOC and EPA-approved RAP, "FDER still intends to pursue enforcement action against Chevron pursuant to State statutes and regulations concerning water quality standards and criteria.").

[3]November 1, 1991 letter from Mr. Hubbard to EPA-OSC at 2 ("According to section 2.0 of the RAP, removal below the water table is based on the Respondent's internal project goals, whereas ATSDR and EPA require removal only to the water table for the purposes of the AOC. The RAP cites a memo between ATSDR and EPA indicating that below the water table removal may be a long-term remedial goal of EPA's Remedial Branch."); see also December 20, 1991 letter from FDER to EPA-OSC at 2 (continuing to maintain erroneous position that scope of the AOC and EPA-approved RAP removal activities relates solely to "removal down to the water table" and not below).

water table, and consequently, the scope of the removal embraces some dewatering, groundwater treatment and onsite discharge of treated groundwater.

The Regulatory Background For this Site

The scope of the present CERCLA response action for this Site is not limited to soil removal as suggested in FDER correspondence. The AOC makes clear that Chevron is required to assess, and then respond to, hazardous substances found in groundwater in certain areas of the Site.[4] EPA recently made this clear to FDER when it confirmed in its December 3, 1991 letter that "the approved RAP calls for the **excavation of contaminated soil down into the groundwater table** ... [and] also calls for Chevron to dewater this limited area, to treat all collected water in an onsite temporary treatment system, and to dispose of the treated water in an onsite exfiltration trench."[5] Pursuant to the AOC, Chevron submitted a RAP to EPA, various provisions of which expressly relate to groundwater treatment and onsite discharge.[6] On September 12,

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[4]See e.g. AOC Section III(E) (specifically finding that the results of groundwater samples from the Site indicate that various pesticides and hazardous substances in the groundwater exceed Florida Maximum Contaminant Levels); Section IV(C) (requiring that a well survey be done within one mile of the Site, including sampling, and if hazardous substances are found, the provision of alternative drinking water supplies to impacted parties); Section IV(D) (requiring that Chevron must determine the "extent of contamination in soils (surface and subsurface), sediments, surface water, and groundwater on-site and at adjacent offsite areas ..."); Section IV(G) (Chevron is then required to remove all hazardous substances "from the Site" and "conduct all clean up activities to levels specified by the EPA.").

[5]December 3, 1991 letter from EPA-OSC to FDER at 1 (emphasis added).

[6]See, e.g., RAP Section 1.3.3 (reporting the results of the groundwater sampling plan); Section 2.0 (noting that it is Chevron's plan to "remediate the site to the extent that any requirements of the remedial branch of Superfund will be met" based on a risk assessment, and that "[a]dditional soil removal activities and long-term groundwater remediation (if necessary) will be conducted as part of this removal action to achieve the risk-based goals"); Section 4.3 (addressing the method of the anticipated "Groundwater

1991 the EPA "approved" the Site RAP and informed Chevron that the RAP and its revisions "have been reviewed by the EPA and are satisfactory as written."[7] Since the groundwater treatment complained of by FDER is within the scope of the EPA-approved removal action, as reflected by the following authorities, FDER is without authority to impose permitting or enforcement requirements on such removal activities.

FDER Has No Jurisdiction Over the AOC Removal Activities

Waiver of State Permitting Authority

Subsection 121(e)(1) of CERCLA provides:

> No Federal, **State, or local permit shall be required for the portion of any removal** or remedial action **conducted entirely onsite,** where such remedial action is selected and carried out in compliance with this section.

42 U.S.C. § 9621(e)(1) (emphasis added). On April 9, 1990 EPA implemented Subsection 121(e)(1) in Rule 300.400(e)(1) of the National Contingency Plan ("NCP"), 40 C.F.R. Part 300:

> (e) Permit requirements. (1) No federal, state, or local permits are required for on-site response actions conducted pursuant to CERCLA sections 104, 106, 120, 121, or 122. The term "on-site" means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.

40 C.F.R. § 300.400(e)(1). The effect of this Rule is that compliance with federal, state and local permitting-type administrative requirements is statutorily waived for onsite "response" activities; reflecting "Congress' judgment that CERCLA actions should not be delayed by time-consuming and

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[7]September 12, 1991 letter from EPA-OSC to Nancy Starosciak.

duplicative administrative requirements such as permitting, although the remedies should achieve the substantive requirements of applicable or relevant and appropriate laws." National Oil and Hazardous Substances National Contingency Plan, 55 Fed. Reg. 8666, 8756 (Final Rule, March 8, 1990). This preemption of all permitting authority over CERCLA sites "covers all CERCLA removal and remedial actions (all 'response' actions)." Id. at 8689. Moreover, the term "on-site" in Section 121(e)(1) and its implementory rule, is much broader than the term "facility" in Section 101(9), 42 U.S.C. § 9601(9).[8]

Prohibition of Preimplementation Review of Chosen Remedy

FDER's direct challenge to the scope of Chevron's EPA-approved removal action falls within the United States district courts' "exclusive original jurisdiction over all controversies arising under [CERCLA]." 42 U.S.C. § 9613(b).[9] Under CERCLA "there is no right of judicial [or other] review of the [EPA]'s selection and implementation of response actions prior to completion of the response action or the commencement of EPA enforcement." Copper Indus., Inc v. EPA, ___ F. Supp. ___, 1991 WL 204426, *8 (W.D. Mich. October 1991); 42 U.S.C. § 9613(h). As recently recognized in Cooper, the

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[8]The EPA noted that "the problem with equating on-site with the CERCLA definition of "facility" is that a CERCLA facility is limited to the areas of contamination; it does not include adjacent areas necessary for implementation of response activities." 55 Fed. Reg. at 8689. "[T]he on-site definition is simply broader in order to allow EPA to effectuate the cleanup of "facilities" defined in the statute", Id. at n.3, because "[f]or practical reasons ... on-site remedial actions may, of necessity, involve limited areas of noncontaminated land; for instance, an on-site treatment plant may need to be located above the plume or simply outside the waste area itself." Id.

[9]FDER asserts that "[b]ased on EPA's removal goal ... dewatering and excavation below the water table are not requirements of a Comprehensive Environmental Compensation Response and Liability Act (CERCLA) removal action." December 20, 1991 letter at 2. However, since both EPA and Chevron disagree with this assertion, any action which FDER might take which in any way impinges upon the scope of the EPA-approved removal action, would undoubtedly be construed as a "controversy arising under [CERCLA]" subject to the federal district court's exclusive original jurisdiction. 42 U.S.C. § 9613(b).

CERCLA statutory text and its legislative history indicate that CERCLA's prohibition of preenforcement review of a selected response action "'is intended to be comprehensive ... [It] covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section.'" Id. at *10 (quoting Senator Thurmond).[10]

Thus, in addition to the federal district courts' exclusive jurisdiction over controversies arising under CERCLA, review of "any challenges to removal ... action selected under section 9604 ..." is confined to five defined categories of civil action, none of which is applicable to the situation presented here. See 42 U.S.C. § 9613(h)(1)-(5). For example, FDER cannot challenge or otherwise interfere with the removal action here, since while the removal remedy has been chosen, it has not been "taken" or "secured" in the sense of "completed" intended in Subsection 113(h)(4). City of Eureka v. United States, 770 F. Supp. 500, 502 (E.D. Mo. 1991); 42 U.S.C. § 9613(h)(4). This "ban on preimplementation review extends not only to parties' contentions that the remedy selected does not meet the substantive requirements of CERCLA, but also to procedural claims regarding the EPA's remedy selection process." Cooper at 10.[11]

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[10]As further explained by the Cooper Court, "'[t]he only opportunity for review that is not specifically provided for in the timing of review provision is the opportunity set forth in new section 121(f)(2) and (3), the cleanup standards section relating to (state challenges to enforcement actions already commenced under section 9606 and remedial actions [proposed for] facilities owned and operated by a Federal agency ...'" Id. (quoting Representative Glicksman); U.S. v. Akzo Coatings, Inc., ___ F.2d ___, 1991 WL 255205, *42-45 (6th Cir. Dec. 5, 1991). Absent from Subsection 121(f) is a provision for state challenges to the EPA's selection of a removal (as opposed to a remedial) action.

[11]The principle underlying this ban on preenforcement review is that such review "would be a significant obstacle to the implementation of response actions and the use of administrative orders. Preenforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlements and voluntary cleanups." Id. at *9. This is particularly so in the case of a removal action, since "the distinguishing characteristic of a removal action is the need for speedy action." Con-Tech Sales Defined Benefit Trust v. Cockerham, ___ F. Supp. ___, 1991 WL 209791, *7

Preclusive Effect of the AOC Removal Action

NCP § 300.415(i) further requires that EPA-lead removal actions "shall, to the extent practicable considering the exigencies of the situation, attain applicable or relevant requirements under federal environmental or state environmental or facility siting laws." 40 C.F.R. § 300.415(i). Under the AOC, Chevron is subject to the obligation to conduct the removal action "in accordance with all applicable, relevant and appropriate federal, state and local laws." AOC Section VI(I). The incorporation into the AOC removal action, pursuant to the procedure set out in the NCP, of the substantive requirements of federal and state law, has the legal effect of precluding application of other environmental laws to matters falling within the scope of such removal action. See 50 Fed. Reg. 47910-18 (Nov. 20, 1985); 55 Fed. Req. at 8742;[12] 50 Fed Reg. 5865 (Feb. 12, 1985); cf. United States v. Akzo Coatings, Inc., ___ F.2d ___, 1991 WL 255205, *40-*45 (6th Cir. Dec. 5, 1991) (judicially approved consent decree for remedial action precludes independent state remedies).[13] This means that FDER cannot re-address the

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voluntary cleanups." Id. at *9. This is particularly so in the case of a removal action, since "the distinguishing characteristic of a removal action is the need for speedy action." Con-Tech Sales Defined Benefit Trust v. Cockerham, ___ F. Supp. ___, 1991 WL 209791, *7 (E.D. Pa. Oct. 9, 1991).

[12] "The proposition that on-site CERCLA response actions are not independently subject to other federal or state environmental laws is a long-standing one, based on a theory of implied repeal or pre-emption." Id.

[13] See also Starfield, 1990 National Contingency Plan - More Detail and More Structure, But Still a Balancing Act, 20 Envtl. L. Rep. 10222, n.136 (June 1990) ("the implied repeal theory is based in large part on the existence of the ARARs process under CERCLA § 121(d)(2) and (d)(4), which defines how and to what extent the requirements of federal and state environmental laws should apply to on-site CERCLA remedial actions. Based on these provisions, CERCLA remedies will incorporate (or waive) the standards of other environmental laws, as appropriate under CERCLA. Thus, although other environmental laws do not independently apply to CERCLA response actions, the

substantive aspects of this removal action in the context of attempting to apply state enforcement remedies to this Site.

FDER Has No Authority to Intermeddle in the Removal Activities

Since the AOC was entered under CERCLA Sections 104, 106 and 122,[14] and requires Chevron to conduct an EPA-supervised removal action at the Site, CERCLA expressly provides that no state or local permits are required for all such activities "onsite".[15] Since the "Site" is defined in the AOC to include the entire "Chevron Chemical Company Site, 3100 Orange Blossom Trail, Orlando, Florida", any FDER permitting authority over sampling, treatment or discharge of groundwater "onsite" during the removal action is statutorily waived by Subsection 121(e)(1). This federally-mandated waiver extends to all removal activities at the Site "directly related to responding to the contamination," [55 Fed. Reg. at 8689], and applies to "those areas where the contamination in question has 'come to be located.'" Id. at n.3.[16] Here, since the assessment and cleanup of groundwater

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[14] See AOC preamble ("This Administrative Order on Consent ... is entered into ... pursuant to the authority vested in [EPA] by Sections 104, 106 and 122 of [CERCLA]..."

[15] The permit exemption also controls federal permitting. 55 Fed. Reg. at 8689 ("EPA believes that Congress intended that activities conducted entirely on-site pursuant to CERCLA are exempt from all federal, state or local permits, including permits under RCRA and HSWA. A RCRA permitting requirement would present the same possibility of delay as any other permit.").

[16] To be excluded the activity must be "fundamentally different in nature from conventional on-site actions." 55 Fed. Reg. at 8689. Incorporated into the NCP's inclusive description of typical removal actions are the following activities:

> (6) Excavation, consolidation, or removal of highly contaminated soils from drainage or other areas - where such actions will reduce the spread of, or direct contact with, the contamination; ...

associated with the soil excavation are expressly required in the AOC and approved by EPA in the RAP, such actions cannot be said to be "fundamentally different" from what was contemplated in the AOC.[17] A requirement that Chevron be subjected to Florida permitting to complete this removal or be forced to respond to challenges to the removal action grounded upon state law would unduly delay completion of (and therefore eviscerate the function of) the removal.

The EPA has expressly advised FDER that,

> [b]oth the water treatment system and the exfiltration trench are located entirely onsite and are integral parts of the removal. Therefore, Section 121(e) of CERCLA specifically precludes Chevron or EPA from having to obtain any permit prior to conducting work at the Site. This includes any state permit for the design, construction or operation of the water treatment system the exfiltration trench. Similarly, EPA does not have to condition those aspects of the work upon Chevron's entry into a

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direct contact with, the contamination; ...

(8) Containment, treatment, disposal, or incineration of hazardous materials - where needed to reduce the likelihood of human, animal, or food chain exposure;

NCP § 300.415(d)(6) & (8); 40 C.F.R. § 300.415(d)(6) & (8).

[17] As EPA explained in the preamble to proposed NCP rule 300.400(e), "a direct discharge of CERCLA wastewater would be an on-site activity if the receiving water body is in the area of contamination or is in very close proximity to the site, even if the water flows off-site." National Oil and Hazardous Substances Pollution Contingency Plan, 53 Fed. Reg. 51394, 51407 (Proposed Rule, Dec. 21, 1988). As explained in Freedman, Proposed Amendments to the National Contingency Plan: Explanation and Analysis, 19 Envtl. L. Rep. 10103, ____(32) (1989), "[w]hile it may be objected that this involves an off-site transfer, any other interpretation would eviscerate the exemption in § 121(e)." Id.

The same reasoning holds true with regard to any Florida air permit. In explaining the NCP permitting exemption rule, EPA has noted that the term "'areal' refers to both surface areas **and the air above the site.**" 55 Fed. Reg. at 8689 (emphasis added). Any enforcement activity which seeks to compel AOC removal activities comply with state permitting requirements would be similarly of no effect under CERCLA Sections 121(e)(1) and 113(b). Accordingly, any attempt to utilize state laws to interfere with the scope of the present ongoing removal action would be preventable in a declaratory judgment action in federal district court.

Long-Term Remediation of This Site

While FDER lacks authority over the AOC removal activities being implemented pursuant to the EPA-approved RAP, Chevron recognizes that it is a potentially responsible party and must ultimately participate in long-term remediation of the groundwater at the Site. As Chevron explained in its December 16, 1991 letter, however, Chevron desires to accomplish this result without having to respond to the potentially inconsistent and duplicative demands of FDER and EPA Region IV. As EPA is presently the lead agency with regard to this CERCLA Site, EPA should have primary responsibility for supervising the transition from removal to remedial action. To avoid just the type of problem which has arisen in the present case, the NCP imposes on the EPA the responsibility for coordinating any transition from removal to remedial response activities at a site such as this, where the EPA has exercised its CERCLA Section 104 powers. 40 C.F.R. § 300.415(f).[19]

Placing responsibility for any transition to remedial action upon the EPA is eminently reasonable. For example, as you may be aware, this Site is

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[19] NCP § 300.415(f) states:

> If the lead agency [here EPA] determines that the removal action will not fully address the threat posed by the release and the release may require remedial action, the lead agency shall ensure an orderly transition from removal to remedial response activities.

presently being scored under the Hazardous Ranking System for placement on the National Priorities List ("NPL"). If FDER and Chevron were now to expend the time and resources to negotiate and enter into a Consent Order for long-term groundwater remediation (and to engage in the appropriate Site assessment activities under a site-specific quality assurance project plan), and the Site were then added to the NPL, all of FDER and Chevron's effort would be nullified. Upon addition to the NPL, all remediation activity at this Site would be subjected to the exclusive jurisdiction of the EPA. See 42 U.S.C. §§ 9620(3)(1), 9622(e)(6) (NPL Site must undergo RI/FS), (inconsistent response action); United States v. Colorado, ___ F. Supp. ___, 33 ERC 1585, 1991 WL 193519 (D. Colo. 1991) (seven years of Colorado enforcement effort precluded upon NPL listing for Site). Chevron would then be required to negotiate new AOC or Consent Decree arrangements with EPA Region IV under the usual RI/FS, ROD process for long-term groundwater remediation. All of the state regulatory activity and oversight would then have been to no avail. On the other hand, if the Site is not added to the NPL, EPA Region IV Remediation Branch would likely have no further interest, and FDER and Chevron could then take the lead in achieving a Consent Order for long-term remediation.

Since the NPL listing issue will be resolved before the completion of the present removal action, there is no point in immediately engaging in the process of issuance of a Notice of Violation and negotiation of a Consent Order for long-term groundwater remediation. The NPL issue should first be resolved and EPA should coordinate the orderly transition to long-term remediation (whether under EPA or FDER supervision).

Applicable or Relevant and Appropriate Requirements

The apparent dispute between EPA and FDER regarding the identification of ARARs is unfortunate.[20] When the NCP procedures function

[20] Compare December 3, 1991 letter from EPA-OSC to FDER with December 20, 1991 letter from FDER to EPA-OSC.

properly, the EPA consults with the State in all EPA-lead removal actions. 40 C.F.R. § 300.525(e). While the EPA has the primary responsibility for setting the ARARs to which such removal actions must comply, [40 C.F.R. § 300.415(i)], the State of Florida "shall be responsible for identifying **potential** state ARARs ... and for providing such ARARs to EPA in a timely manner for **all EPA-lead removal actions.**" NCP § 300.525(d), 40 CFR § 300.525(d) (emphasis added).

Chevron will certainly comply with properly determined ARARs in this removal. Under the NCP and CERCLA case law, "a state environmental requirement or standard constitutes a state ARAR to which the remedy must comply if it is (1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified." United States v. Akzo Coatings, Inc., ___ F.2d ___, 1991 WL 255205, *25 (6th Cir. Dec. 5, 1991). Chevron would appreciate it if FDER would immediately specifically identify the state ARARs to which it believes the present removal action should comply, taking the time to explain whether FDER considers such requirements to be "applicable," or "relevant and appropriate," or merely "to be considereds" as those terms are understood and used in the NCP.[21]

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[21] See 40 C.F.R. § 300.5 (definitions of "applicable requirements" and "relevant and appropriate requirements"); 40 C.F.R. § 300.415(i) ("Other ... state advisories, criteria, or guidance may, as appropriate, be considered in formulating the removal action (see § 300.400(g)(3))."); 40 C.F.R. § 300.415(i) (When deciding whether compliance with ARARs is practicable, the EPA may consider appropriate factors, including "(1) The urgency of the situation; and (2) The scope of the removal action to be conducted."). See also Akzo, 1991 WL 255205 at *25-*31 (discussing the identification of ARARs); 40 C.F.R. § 300.400(g) (ARAR identification in remedial actions); 55 Fed. reg. at 8694-96 (EPA guidance on NCP § 300.415(i)); Starfield, supra note 11, (footnotes 148-163 and accompanying text; removal actions - compliance with ARARs). As the Preamble to the NCP Section 300.400(g)(4) explains, "it is not sufficient to provide a general 'laundry' list of statutes and regulations that might be ARARs for a particular site. The state, and EPA if it is the support agency, must instead provide a list of requirements **with specific citations to the section of law identified as a potential ARAR,** and a brief explanation of why that requirement is considered to be applicable or relevant and appropriate to the site." 55 Fed. Reg. at 8746 (March 8, 1990) (emphasis added).

JORDEN SCHULTE & BURCHETTE

We look forward to meeting with you in the near future to discuss this situation. We believe that Chevron and the regulatory agencies will be able to achieve an orderly and coordinated remediation of this Site and are willing to cooperate to that end.

Sincerely,

FGB/mpd

cc: Jeff D. Wyatt
Susan Klinzing
Larry Brannen
A. Alexander

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